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MALAYAN BANKING BHD

v.

HJH SUZAINAH ABDULLAH

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HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[ORIGINATING SUMMONS NO: (MT-1) 24-825-2008]
12 MAY 2009

C ***BANKING:*** *Guarantee and indemnity - Enforcement of - Judgment obtained against borrower company - Whether guarantor bound by terms of judgment although case against guarantor dismissed - Whether action time-barred - Whether res judicata - Whether abuse of court's process - Specific Relief Act 1950, ss. 34, 41*

D ***CIVIL PROCEDURE:*** *Action - Guarantee - Enforcement of - Judgment obtained against borrower company - Whether guarantor bound by terms of judgment although case against guarantor dismissed - Whether action time-barred - Whether res judicata - Whether abuse of court's process - Specific Relief Act 1950, ss. 34, 41*

E

The plaintiff brought an action in the sessions court against a company called Matsan Sdn Bhd ('Matsan') and the defendant for the sum of RM69,665.24 in respect of a loan granted to Matsan in which the defendant was a guarantor. The plaintiff obtained F judgment in default against Matsan and after a full trial its case against the defendant was dismissed with costs. The plaintiff's appeal to the High Court and subsequent application for leave to the Court of Appeal were dismissed. The plaintiff now applied, pursuant to ss. 34 and 41 of the Specific Relief Act 1950, *inter* G *alia*, for a declaration that the defendant was bound by the judgment it obtained against Matsan by virtue of cl. 12 of the relevant letter of guarantee.

Held (dismissing the application):

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(1) The six-year limitation period started to run from 13 March 2000, *ie*, the date of the letter of demand. Since the present application was filed on 18 March 2008, the plaintiff's application against the defendant was time-barred. (para 8)

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(2) The judgment upon which the plaintiff's application was based was procured under the civil suit. It was a judgment in default obtained against Matsan, one Ahmad Othman and one Ramlee Sharom. The defendant was cited as the 4th defendant therein. The plaintiff's claim against the defendant was tried and dismissed with costs. Its appeals to the High Court and the Court of Appeal were also dismissed. In the civil suit and in the present application, the plaintiff's cause of action was based on the same facts and issues, *ie*, the guarantee and the letter of demand. The cause of *estoppel* arose when the plaintiff's claim was determined in the judgment of the civil suit after trial before the sessions court judge. The judgment of the sessions court was a final judgment. The plea of *res judicata* raised by the defendant should succeed. (paras 9 & 12)

(3) On whether the plaintiff's application was an abuse of the court's process, the following salient points should be noted. Firstly, the sum of RM69,665,24 fell within the jurisdiction of the sessions court. Secondly, the defendant was cited as the 4th defendant in the civil suit. Thirdly, the plaintiff's claim against the defendant was dismissed after trial in the civil suit. Fourthly, the plaintiff was asking for an order for payment of the said sum after having failed to obtain judgment against the defendant. In addition, the plaintiff's application was filed after a lapse of eight years from the date the cause of action accrued. It was also filed after a lapse of two years ten months from the judgment date dismissing the plaintiff's claim against the defendant. There was clearly an inordinate delay on the plaintiff's part in filing the present application. No explanation or clarification for the delay was given. The plaintiff's application was an attempt to re-litigate the claim by the device of framing the proceeding as a claim for a declaration of the plaintiff's rights instead of a direct claim. It was not open to the plaintiff to resort to that device in order to circumvent the final judgment. In the circumstances, the plaintiff's application was an abuse of the court's process. (paras 13 & 14)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Fu Lee Development Sdn Bhd & Ors [1990] 1 LNS 126 HC ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Re J Brown's Estate [1893] 2 Ch 300 ***(refd)***

Tengku Azmi Tengku Yusoff & Anor v. Tengku Ahmad Tengku Abdul Ghaffar & Ors [1982] CLJ 22; [1982] CLJ (Rep) 347 FC ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6
Rules of the High Court 1980, O. 15 r. 6
Specific Relief Act 1950, ss. 34, 41

Other source(s) referred to:

Spenser-Bower & Turner, *Res Judicata*, 2nd edn, p 371

For the plaintiff - Danny Loo (Idayu with him); M/s A Rahim & Co
For the defendant - CH Ng; M/s Ng, Fan & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] The plaintiff's application pursuant to ss. 34 and 41 of the Specific Relief Act 1950 ('the Act') is for the following orders:

(i) a declaration *inter alia* that consistent with cl. 12 of the letter of guarantee dated 12 December 1998 the defendant is bound by the terms of the judgment entered against Matsan Sdn Bhd on 24 August 2000;

(ii) that the defendant is liable to the plaintiff;

(iii) that the total amount liable to be paid by Matsan Sdn Bhd must be paid by the defendant within 14 days of the date of the order.

Brief Account Of The Facts

[2] The defendant executed a guarantee dated 12 February 1998 ('the guarantee') in favour of the plaintiff in consideration of a loan granted to Matsan Sdn Bhd ('Matsan'). Matsan defaulted in the repayment of the loan. The plaintiff issued a letter of demand dated 13 March 2000 to the defendant demanding repayment of RM69,665.24. Subsequently the plaintiff instituted a civil action against Matsan and the defendant in the Johor Bahru Sessions Court under Summons No. 52-1719-2000 (3) ('the Civil Suit'). The plaintiff obtained judgment in default against Matsan on 24 August 2000 for the sum of RM69,665.24 together with interest and costs. After a full trial of the Civil Suit the plaintiff's action against the defendant was dismissed with costs on 20 April 2005. On 4 July 2006 the plaintiff's appeal against the decision of the Sessions Court was dismissed by the Johor Bahru High Court. The plaintiff's application to the Court of Appeal for leave to appeal to the Court of Appeal was dismissed on 21 March 2007.

Plaintiff's Case

[3] Learned counsel for the plaintiff submitted that the court has the power to make a declaration of status or right under s. 41 of the Act. The plaintiff's right is founded on the guarantee signed by the defendant in favour of the plaintiff. Order 15 r. 6 of the Rules of the High Court 1981 was also cited to say that the court has unlimited jurisdiction to make such declaration at its discretion.

Defendant's Reply

[4] Learned counsel for the defendant submitted that the plaintiff's claim and action is time-barred. The present action was filed after more than eight years from the date the notice of demand against the defendant was issued. According to s. 6 of the Limitation Act 1953 actions founded on contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. In this case as the claim is based on a 'on demand' guarantee the cause of action commences from the date of the issuance of the notice of demand (*Bank Bumiputra Malaysia Bhd v. Fu Lee Development Sdn Bhd & Ors* [1990] 1 LNS 126). As the letter of demand was issued on 13 March 2000 the

limitation period of six years expired on 12 March 2006. The plaintiff's application was filed after 12 March 2006 and is time-barred.

[5] It was also submitted that the plaintiff's application is also barred by the plea of *res judicata* and that there should be finality in litigation (*Tengku Azmi Tengku Yusoff & Anor v. Tengku Ahmad bin Tengku Abdul Ghaffar & Ors* [1982] CLJ 22; [1982] CLJ (Rep) 347 FC; *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 SC).

[6] Finally, learned counsel for the defendant submitted that the plaintiff's application is an action in disguise. The plaintiff did not specify the amount of the debt to be paid and only referred to the judgment obtained against Matsan. The judgment for RM69,665.24 against Matsan was obtained in the civil suit. The claim for the sum of RM69,665.24 falls within the jurisdiction of the Sessions Court. In the civil suit the plaintiff's claim against the defendant was dismissed after a full trial. The plaintiff is now asking for an order for payment when they have failed to obtain judgment against the defendant at the civil suit. The plaintiff's application is an abuse of process of the court.

Issues

[7] In this matter the issues to be determined are as follows:

i. Whether the plaintiff's application is time-barred?

ii. Whether the plea of *res judicata* is applicable against the plaintiff's application?

iii. Whether the plaintiff's application is an abuse of process of the court?

Findings Of The Court

i. Whether The Plaintiff's Application Is Time-barred?

[8] According to cl. 1 of the Guarantee (exh. OAR2) the defendant will pay to the plaintiff 'on demand' all moneys due and owing by Matsan. Where there is a covenant or promise to pay a collateral sum on demand, such as a covenant by the defendant *qua* surety for Matsan the principal debtor a demand must be made before an action or before the money can be considered as

owing by the surety (see *Re J Brown's Estate* [1893] 2 Ch 300). For the purpose of the Limitation Act 1953 the six years limitation period started to run from 13 March 2000 the date of the letter of demand. Since the present application was filed on 18 March 2008 the plaintiff's application against the defendant is time-barred for being filed after 12 March 2006 (see *Bank Bumiputra Malaysia Bhd v. Fu Lee Development Sdn Bhd & Ors, supra*).

ii. Whether The Plea Of Res Judicata Is Applicable Against The Plaintiff's Application?

[9] The judgment upon which the plaintiff's application is based was procured under the civil suit. It is a judgment in default obtained against Matsan, one Ahmad bin Othman and one Ramlee bin Sharom. In the Civil Suit the defendant was cited as the 4th defendant. Subsequently the plaintiff's claim against the defendant in the civil suit was tried and dismissed with costs on 20 April 2005. The plaintiff's appeal against the decision of the Sessions Court dismissing its claim was dismissed by the High Court on 4 July 2006. The plaintiff applied to the Court of Appeal for leave to appeal against the decision of the High Court. The plaintiff's application for leave was dismissed by the Court of Appeal on 21 March 2007.

[10] What is *res judicata* has been elucidated by the Supreme Court in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd, supra*. It is worthwhile to quote *in extenso* what Peh Swee Chin FJ said:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an *estoppel* per *rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate acciptur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa*. Both maxims are the rationale for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

Since a *res judicata* creates an *estoppel* per *rem judicatum*, the doctrine of *res judicata* is really a doctrine of *estoppel* per *rem judicatum*, the latter being described sometimes in a rather archaic way as *estoppel* by record. Since the two doctrines are the same, it is no longer of any practical importance to say the *res judicata* is a rule of procedure and that an *estoppel* per *rem judicatum* is that of evidence. Such dichotomy is apt to give rise to confusion.

The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v. Henderson* [1843] 3 Hare 100 at p 115 which is:

> The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

It might be of interest to point out that one of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the same parties, a default judgment is different from a final judgment on the merits, the latter is the category to which the judgment in the said originating motion given before the filing of the action as concerned directly herein below belongs. Please see the finer points of law in regard to the default judgments from the position of the doctrine of *res judicata* in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1964] MLJ 49. We have thus mentioned this question of default judgment in passing as it has sometimes been a small source of confusion to the litigants.

To revert to that famous passage set out above, the next step is state our view on its scope of operation or approach towards such scope which has given rise to certain controversial aspects referred to earlier. Bearing in mind the well-known relevancy of a previous judgment in barring a second suit, eg please see s. 40 of the Evidence Act 1950, it will be readily understood that when Wigram VC spoke of 'points', the points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just not just all issues of law or of fact that are in dispute between the parties. The relevant case law revolves itself into this understanding. Lack of this understanding causes, in our view, a fair share of the confusion in connection

with the famous passage of Wigram VC which Lord Shaw in *Hoystead v. Taxation Commissioner* [1962] AC 155 at p 170 spoke of as 'settled law' in the Privy Council.

Thus, there are in fact two kinds of *estoppel* per *rem judicatum*. The first type relates to cause of action *estoppel* and the second, to issue *estoppel*, which is a development from the first type.

The cause of action *estoppel* arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is *res judicata*.

In order to prevent multiplicity of action and also in order to protect the underlying rationales if *estoppel* per *rem judicatum* and not to act against them, such *estoppel* of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.

[11] In determining whether a judicial decision is a final decision, it is also helpful to refer to the treatise on *Res Judicata* by Spenser-Bower & Turner, 2nd edn enunciated at p. 371 as follows:

For the purpose of *estoppel* per rem judicatam, ..., the judicial decision relied upon as creating the *estoppel* must be shown to have been final in both the senses there indicated: that is to say, there is no *estoppel* if the judicial decision as recorded is imperfect, provisional, indefinite, or ambiguous, or if, though *ex facie* appearing to be final, it is liable, whether at common law, or by statute, to be rescinded, varied, or re-opened by the tribunal which pronounced it.

[12] Applying the principles enunciated above it is pertinent to note that in both the civil suit and in the present application the plaintiff's cause of action is based on the same facts and issues *viz*, the guarantee and the letter of demand dated 13 March 2000. In this instance the cause of *estoppel* arises when the plaintiff's claim was determined in the judgment of the civil suit after trial before the Sessions Court judge. The cause of action has turned into the aforesaid judgment. In the circumstances of the present

A case the court is of the view that the judgment of the Sessions Court is a final judgment as it satisfies both requirements of finality abovementioned. Where the judgment concerned is a final judgment it is necessary to prevent multiplicity of action. Accordingly, the plea of *res judicata* raised by the defendant should
B succeed (see *Tengku Azmi Tengku Yusoff & Anor v. Tengku Ahmad Tengku Abdul Ghaffar & Ors, supra; Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104 CA).

iii. Whether The Plaintiff's Application Is An Abuse Of Process Of The
C *Court?*

[13] In this regard it is pertinent to note a few salient points. Firstly, the sum involved of RM69,665,24 falls within the jurisdiction of the Sessions Court. Secondly, in the civil suit the defendant was cited as the 4th defendant. Thirdly, the plaintiff's
D claim against the defendant in the civil suit was dismissed after trial. Fourthly, the plaintiff is now asking for an order for payment of the said sum after having failed to obtain judgment at the Sessions Court.

E **[14]** It is equally pertinent to note that the plaintiff's application was filed on 18 March 2008 after a lapse of eight years from the date the cause of action accrued. It was also filed after a lapse of two years ten months from the judgment dated 20 April 2005 dismissing the plaintiff's claim against the defendant. Clearly there
F has been an inordinate delay on the plaintiff's part in filing this application. No explanation or clarification for the delay was forthcoming. The plaintiff's application is an attempt to re-litigate the claim by the device of framing the proceeding as a claim for a declaration of the plaintiff's rights instead of a direct claim. For the
G reasons ascribed to above it is not open to the plaintiff to resort to that device in order to circumvent the final judgment. In the premises the court finds that the plaintiff's application is an abuse of process of the court.

H **Conclusion**

[15] The plaintiff's application which is founded on the guarantee is time-barred for being filed after more than six years from the date of the letter of demand. The plaintiff is also precluded from
I proceeding with its application by *res judicata* as the judgment in

the civil suit is a final judgment based on the same facts and issues. The plaintiff's claim under the cloak of a proceeding for a declaration of its rights is in reality an attempt to re-litigate the claim. This is an abuse of process of the court. For the foregoing reasons the plaintiff's application must be dismissed with costs.

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